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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

—v.—

LARRY G. HARDISON, *et al.*,
Respondents,

—and—

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Petitioners,

—v.—

LARRY G. HARDISON, and TRANS WORLD AIRLINES, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; BRIEF *AMICUS CURIAE*

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the

within brief amicus curiae. Counsel for Mr. Hardison and counsel for the unions have consented to the filing of this brief; counsel for Trans World Airlines has neither consented nor objected.*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated solely to defending the safeguards of the Bill of Rights. In its 55-year history, the ACLU has been particularly concerned with and sensitive to the protection of religious conscience, as well as with the prohibition on the establishment of religion. In that connection, we participated as amicus curiae in this Court's landmark decision in Sherbert v. Verner, 374 U.S. 398 (1963). The issues raised here are similar to the ones considered there. In our view, the protection of religious conscience embodied in Title VII of the Civil Rights Act of 1964, as amended, is a valid and proper exercise of congressional power in the service of constitutionally valid objectives.

It is to present this analysis that amicus curiae respectfully moves for leave to file this brief.

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* Copies of these various letters will be filed with the Clerk.

Respectfully submitted,

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES
UNION, AMICUS CURIAE

Interest of Amicus

The interest of amicus appears from the foregoing motion.

Constitutional, Statutory and Regulatory Provisions Involved

The First Amendment to the Constitution provides in part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof....

Article I, Section 8 of the Constitution provides in part:

> The Congress shall have the power...
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000c-2(a)) provides:

> It shall be an unlawful employment practice for an employer -

> (1) to...discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's... religion....

Acting under this provision, the EEOC, in 1967, adopted Guideline 1605.1 (29 C.F.R. Section 1605.1) which provides:

> [S]ection 703(a)(1) of the Civil Rights Act of 1964...includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> ...[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

In 1972, Title VII of the 1964 Civil Rights Act was amended by adding the following language as Section 701(j) (42 U.S.C. Section 2000e(j):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an

> employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The Question to Which This Brief is Addressed

The brief in this case, involving the dismissal of an employee who for religious reasons refused to work on his Sabbath, is addressed to the single question: Was the enactment of Section 801(j) of the Civil Rights Act of 1964 within the "necessary and proper" clause of Article I, Section 8 of the Constitution as applied to the Free Exercise Clause of the First Amendment?

Summary of Argument

Although the constitutionality of the Civil Rights Act of 1964 has been upheld by this Court as a valid exercise of the "necessary and proper" provisions as applied to the Commerce Clause, it could equally have been upheld under that provision as applied to the Equal Protection Clause. By the same reasoning, insofar as the specific issue raised in this proceeding is concerned, it could have been upheld under the provision as applied to the Free Exercise Clause of the First Amendment. In enacting the 1972 amendment to the Civil Rights Act of 1964 in issue in this case, Congress could well have determined that it

was necessary and proper in order to assure the free exercise of religion that employers should not discriminate against employees whose religious commitments can be accommodated without undue hardship on the conduct of the employer's business.

ARGUMENT

THE VALIDITY OF SECTION 701(j) OF THE CIVIL RIGHTS ACT OF 1964 CAN BE SUSTAINED UNDER THE "NECESSARY AND PROPER" CLAUSE AS APPLIED TO THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

It is a universally recognized historic fact that the Civil Rights Act of 1964 was a product of the struggle for full equality by black people in the post-World War II period. It constituted a resumption of the struggle begun in the Reconstruction period by the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments and the enactment by Congress of seven civil rights laws during that period. But it was more than that, for if that is all that it was there would have been neither need nor purpose for including a prohibition against discrimination on ground of religion. In the hearings which preceded the enactment of the statute there was no testimony offered nor other evidence presented to indicate that America's blacks suffered discrimination because of their religion. On the contrary, blacks, while members of the nation's racial minorities, are at the same time members of its religious majority.

In defending the constitutionality of the Civil Rights Act of 1964 in its application against nongovernmental enterprises the Government, in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), based its case primarily on the Commerce Clause because it feared that the Court might hold that the power of Congress to act under the Fourteenth Amendment was limited to governmental discrimination. It soon became manifest that the fear was unfounded; the Court was soon to hold that although Section 1 of the Fourteenth Amendment is judicially enforceable only against state action, Congress is not so limited under Section 5, which empowers Congress to enforce Section 1 by appropriate legislation. United States v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971).

Neither the First Amendment nor any other of the first ten amendments has an express enforcement clause. It is difficult to believe that Congress has less power to insure meaningful enforcement of these amendments than it has in respect to the Thirteenth and all subsequent amendments that do have such a clause. The simple answer is that the "necessary and proper" provision of Article I, Section 8 of the Constitution serves exactly the same purpose as the "appropriate legislation" provision in the Thirteenth and later amendments; indeed, the word "appropriate" is simply the 19th century form of the 18th century word "proper."

We do not contend that the Free Exercise Clause, standing by itself, forbids dismissal by Trans World Airlines (hereinafter, TWA) of Hardison because he is a Sabbatarian whose conscience forbids him to work on Saturdays. We urge only that the "necessary and proper" provision applied to the Free Exercise Clause of the First Amendment empowered Congress to enact the 1972 amendment to the Civil Rights Act of 1964 here in issue.

The petitioners in the present cases do not challenge the constitutionality of the original provision in the 1964 Act forbidding employment discrimination because of religion (Section 703(a); 42 U.S.C. 2000e-2(a)). They challenge only the constitutionality of the 1972 amendment defining religion to include all aspects of religious observance or practice, accommodation whereto does not impose undue hardship upon the employer. That definition, we suggest, is far closer to the wording of the Free Exercise Clause than is the Act itself to the Commerce Clause.

To the argument in the Heart of Atlanta Motel case that in enacting the statute Congress was motivated by moral judgments rather than a desire to facilitate commercial intercourse, the Court replied:

> ...In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from

> the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong. Heart of Atlanta Motel v. United States, 379 U.S. at 252-253.

Certainly, moral judgments are at least as appropriate to the free exercise of religion as they are to the free flow of commerce.

The broad scope of Congressional powers under the "necessary and proper" clause was expressed in classic terms by Chief Justice Marshall in McColluch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819):

> ...Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

Nothing in the Constitution expressly authorized Congress to establish a bank of the United States, and certainly nothing

authorized it to establish branches and subbranches of such a bank. Nevertheless, the Court held that Congress could constitutionally conclude that it was necessary and proper for the execution of the expressed powers to lay and collect taxes, to pay debts and borrow money that such a bank with branches and subbranches be established. Certainly, at least as much can be said for the 1972 amendment to the Civil Rights Act in respect to the Free Exercise Clause.

The first ten amendments to our Constitution have often been called our expanding Bill of Rights. In most cases, the expansion has been effected by judicial decisions, some of them on their face far more distant from the original language than the religion provision of the Civil Rights Act of 1964. Thus the First Amendment's guaranty of freedom to speak has been held to encompass freedom to communicate feelings through symbols such as a red flag[1] or a black armband,[2] freedom to hear or read,[3] and indeed the direct opposite of freedom to speak, that is, freedom not to speak.[4] Its

1. Stromberg v. California, 283 U.S. 359 (1931).
2. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
3. Stanley v. Georgia, 394 U.S. 557 (1969).
4. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

guaranty of freedom of assembly has been held to encompass freedom of association and to keep secret from the government the fact of such association.[5] Perhaps even more spectacularly, the opening word of the amendment, "Congress" - a word which one would assume to be ultimately precise in its meaning, especially since it is used in reference to making laws - has in effect been construed to mean also the President[6] and the judiciary.[7]

More apposite to the issue in the present case are decisions of the Court construing the Free Exercise Clause as forbidding compulsory jury service by one whose religious convictions preclude such service,[8] and barring enforcement of compulsory school attendance laws against parents and youths whose religious convictions forbid school attendance beyond the elementary school level.[9] Most pertinent to the present case, however, are the Court's decisions in Sherbert v. Verner, 374 U.S. 399 (1963) and Marsh v. Alabama, 326 U.S. 501 (1946).

5. National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958).
6. Laird v. Anderson, 466 F.2d 283, certiorari denied 409 U.S. 1076 (1972).
7. New York Times Co. v. United States, 403 U.S. 713 (1971).
8. In re Jennison, 375 U.S. 14 (1963).
9. Wisconsin v. Yoder, 406 U.S. 205 (1972).

In Sherbert v. Verner the Court held violative of the Free Exercise Clause the denial of unemployment compensation to a worker who, like Hardison in the instant case, could not accept or retain employment requiring work on Saturday because it was contrary to her religious convictions.

In Marsh v. Alabama, the power of Congress to act affirmatively to protect freedom of religion was strongly suggested by the Court. It there held that, under the Free Exercise Clause, a company wholly owning a town could not bar colporteurs from distributing religious tracts on its streets. In reaching that result, it specifically suggested (although Justice Frankfurter expressed the view, at p. 511, that it was not necessary to do so) that the same result could have been reached by Congressional action under the Free Exercise Clause. It said (p. 507, n. 4):

> ...And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce. In his dissenting opinion in Jones v. Opelika, 316 U.S. 584, 600,...which later was adopted as the opinion of the Court, 319 U.S. 103, 194,... Mr. Chief Justice Stone made the following pertinent statement: "Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome

> taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, unaided by Congressional legislation, from burdensome taxation under the commerce clause,...it cannot be thought that that function is wanting under the explicit gurananties of freedom of speech, press and religion." (Emphasis added)

The power of Congress to protect interstate commerce from interference, by burdensome taxation or otherwise, extends to interference by private enterprises like petitioner TWA as well as to interference by states. In the present case, Congress has enacted legislation of the kind suggested in Marsh. What we here suggest is that its enactment can be viewed as an exercise of the Congressional powers under both the Commerce and Free Exercise Clauses, since the "necessary and proper" clause applies equally to both.

Property and contract rights, the Court held in Marsh, are important in our democratic system, but civil liberties are even more important:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we

> must here, we remain mindful of the fact that the latter occupy a preferred position... In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties... (326 U.S. at 509).

We deem Marsh v. Alabama particularly apposite because as a political-social-economic reality the modern multi-state and multi-national corporation such as TWA is the latter twentieth century equivalent of the company town of the nineteenth and early twentieth centuries. The Bill of Rights speaks to governmental entities, national, state and local, but when a world-wide corporation such as TWA plays as large or larger a role in affecting the lives and livelihoods of individuals as do small towns, village officials and local public school boards, it is, we believe, within the power of Congress under the "necessary and proper" clause to make applicable to them some of the constraints of the First Amendment.

Particularly relevant, too, are the Sunday Law Cases, specifically Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961), and Braunfeld v. Brown, 366 U.S. 599 (1961).

There, in upholding the constitutionality of compulsory Sunday closing laws even when enforced against persons who, like the respondent herein, observe Saturday or some other day of the week but Sunday as their holy day of rest, Chief Justice Warren went out of his way to observe that a "number of States provide such an exemption [for Sabbatarians], and this may well be the wiser solution of the problem."[10] In the present case this is exactly what Congress has done: it has provided an exemption for Sabbatarians as the wiser solution to the problem.

Acting upon this advice of Chief Justice Warren all three of the states involved in those cases, Massachusetts, Pennsylvania, and Maryland, as well as New York whose compulsory Sunday closing law had previously been upheld when enforced against a Sabbatarian,[11] amended their laws so as to provide exemptions for persons who observed a day other than Sunday as their holy day of rest. The constitutionality of such an exemption was challenged in Arlan's Department Store v. Kentucky[12] on precisely the same grounds

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10. 366 U.S. at 608

11. Friedman v. New York, 341 U.S. 75 (1951), dismissing appeal in 302 N.Y. 75.

12. 371 U.S. 218 (1962), dismissing for want of a substantial federal question, 357 S.W.2d 708.

upon which the petitioners rely in the present case, namely that its purpose and effect were to aid religion. This Court, however, summarily rejected an application to review a decision upholding constitutionality.

The relevance and cogency of these decisions are not impaired by the fact that the protagonists in these cases were individuals asserting claims to the free exercise of religion, and governmental bodies, federal, state and municipal, the antagonists. In the first place, in Marsh v. Alabama, supra, the real party in interest and hence real antagonist was not the State of Alabama but the Gulf Shipbuilding Corporation which owned the town known as Chickasaw. In the second place, and more important, the preservation and protection of the liberties of Americans is not the exclusive domain of the judiciary; the legislative and executive departments too have a significant role to play, for their members too are required by Article VI to support the Constitution, including the First Amendment and its guaranty of the free exercise of religion. Fifteen years before the Amendment was added to the Constitution Thomas Paine said in Common Sense:

> As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which the government hath to do

> therewith.[13]

There is no reason to believe that in making this statement Paine had in mind only the judicial branch and intended to exclude the legislative and executive departments from the duty to protect conscientious professors of religion, such as the respondent Hardison in the present case.

Enactment of the statute challenged herein is not the first instance in which Congress intervened to protect religious liberty beyond the limits constitutionally imposed upon it. At least since the Selective Draft Law Cases during World War I,[14] it has been the established law that the Free Exercise Clause does not preclude imposition of compulsory military service upon those who for religious convictions will not participate in armed conflict.[15] The reason for these decisions

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13. M.D. Conway, ed., Writings of Thomas Paine, Vol. 1, pp. 108-109. (Emphasis added)

14. Arver v. United States, 245 U.S. 366 (1918)

15. Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); In re Summers, 325 U.S. 561 (1945).

is that the courts must accept the judgment of Congress in balancing the competing claims of the nation's ability to defend itself and the demands of religious conscience. Nevertheless, when Congress determines that according exemption to conscientious objectors would not impair the nation's ability to defend itself and accordingly grants exemption to religious objectors, that decision, this Court has held, would not violate the Establishment Clause but would on the contrary be consistent with the spirit if not the command of the Free Exercise Clause. Gillette v. United States, 401 U.S. 437 (1971). We add only that the hardships suffered by other draftees called upon to serve because of the exemption accorded by Congress exceed by far those suffered by the petitioners herein.

The petitioners in this case place their exclusive reliance on the Establishment Clause of the First Amendment. There may be instances in which there is, or appears to be, a clash between different values protected in the Bill of Rights, for example, cases in which the judge in a criminal proceeding feels that a fair trial in the particular circumstances of the case is impossible unless the press is barred, thus presenting a conflict between the freedom of the press guaranty of the First Amendment and the Sixth Amendment's

guaranty of a fair trial.[16] Closer to the present case are instances in which it is claimed that strict enforcement of the Establishment Clause would impinge upon the rights secured by the Free Exercise Clause. We believe that in most if not all cases these conflicts are more apparent than real. Neither Paine, who would impose a duty upon government affirmatively to protect religious liberty but at the same time to have no further business with religion, nor James Madison, the author of the First Amendment, which forbids government equally to establish religion or to prohibit its free exercise, saw any conflict between them. In any event we do not believe any such clash or conflict is presented in the instant case. Other briefs, submitted by the respondent and other amici curiae, adequately meet the claim that the statute challenged in this case violates the Establishment Clause. We endorse the position they take and accept the arguments they present. For ourselves we urge that in upholding the constitutionality of Section 701(j) of the Civil Rights Act of 1964 the Court will give meaningful effect to the Free Exercise Clause without in any way impairing the integrity of the Establishment Clause.

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16. See. e.g., Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966); Nebraska Press Association v. Stuart, ___ U.S. ___ (1976).

Conclusion

For the reasons set forth herein, as well as the reasons set forth in the briefs of the respondent and other *amici curiae* supporting his position, it is respectfully submitted that the judgment of the Court of Appeals upholding the constitutionality of the statute challenged herein should be affirmed.

Respectfully submitted,

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